IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 342

AMALGAMATED UTILITY WORKERS, affiliated with UTILITY WORKERS ORGANIZING COMMITTEE, CONGRESS OF INDUSTRIAL ORGANIZATIONS,

Petitioner,

against

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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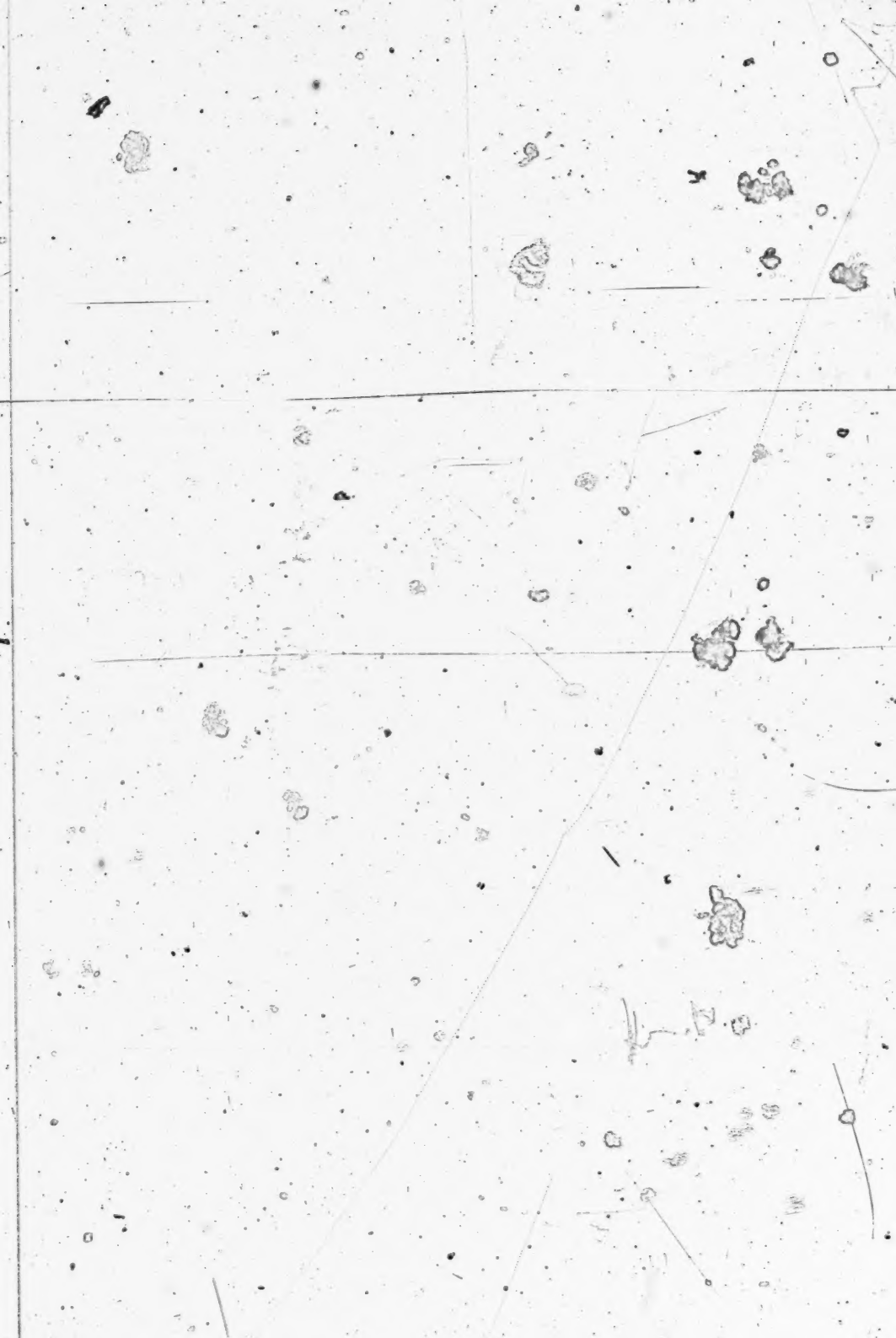

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IN THE

Supreme Court of the United States

In the Matter of the Application of AMALGAMATED UTILITY WORKERS, affiliated with UTILITY WORKERS ORGANIZING COMMITTEE, CONGRESS OF INDUSTRIAL ORGANIZATIONS, To Punish CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and its Affiliated Companies, BROOKLYN EDISON COMPANY, INC., NEW YORK AND QUEENS ELECTRIC LIGHT AND POWER COMPANY, WESTCHESTER LIGHTING COMPANY, THE YONKERS ELECTRIC LIGHT AND POWER COMPANY, NEW YORK STEAM CORPORATION, and CONSOLIDATED TELEGRAPH AND ELECTRICAL SUBWAY COMPANY, For Contempt.	OCTOBER TERM, 1939
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and its Affiliated Companies, et al., Petitioners, against NATIONAL LABOR RELATIONS BOARD, et al., Respondents.	No.....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Amalgamated Utility Workers, respectfully prays that a *writ of certiorari* issue to review the

decision of the United States Circuit Court of Appeals for the Second Circuit rendered in the above proceeding on June 2, 1939, denying Petitioner's motion for an order adjudging Consolidated Edison Company of New York, Inc., and its Affiliated Companies, in contempt of court.

A.

Statement of the Matter Involved.

Petitioner herein, Amalgamated Utility Workers, (formerly known as United Electrical and Radio Workers of America), is a labor union affiliated with Utility Workers Organizing Committee, Congress of Industrial Organizations (CIO). Prior to May 10, 1937, Petitioner, under its former name, United Electrical and Radio Workers of America, filed with the National Labor Relations Board a certain charge or complaint against Consolidated Edison Company of New York, Inc., and its Affiliated Companies named above, to the effect that the said companies had engaged in certain unfair labor practices affecting commerce within the meaning of the National Labor Relations Act, against their employees, being members of Petitioner; and also that the said companies violated the provisions of the National Labor Relations Act by discouraging membership in this Petitioner. Thereupon, and by reason of the filing of the said charges and complaint, the National Labor Relations Board, on or about May 10, 1937, issued its complaint against Consolidated Edison Company of New York, Inc., and its said Affiliated Companies; and thereafter, and in pursuance to the said complaint, hearings were held thereon, which said hearings resulted in an order made by the National Labor Relations Board, on November 10, 1937, which ordered and directed the Consolidated Edison Company of New York, Inc. and its said Affiliated Companies to cease and desist from certain practices and to take certain affirmative action.

The "cease and desist" portion of the said order directed Consolidated Edison Company of New York, Inc. and its said Affiliated Companies to—

"Cease and desist from:

a. *Discouraging membership in United Electrical and Radio Workers of America* or any other labor organization of their employees, or encouraging membership in International Brotherhood of Electrical Workers or any other labor organization of their employees, by discharging or refusing to reinstate any of their employees or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of their employment because of membership or activity in connection with any such labor organization;

b. Urging, persuading, warning, or coercing their employees to join International Brotherhood of Electrical Workers, or any other labor organization of their employees, or threatening them with discharge if they fail to join any such labor organization;

c. Permitting organizers and collectors of dues for International Brotherhood of Electrical Workers or any other labor organization to engage in activities among their employees in behalf of such labor organizations during working hours or on the respondents' property, unless similar privileges are granted to United Electrical and Radio Workers of America and all other labor organizations of their employees;

d. Permitting their employees who were officials of the Employees' Representation Plans to use the respondents' time, property, and money in behalf of International Brotherhood of Electrical Workers or any other labor organization of their employees;

e. Employing detectives to investigate the activities of their employees in behalf of United Electrical and Radio Workers of America or any other labor organization of their employees or employing any other form or manner of espionage for such purposes;

f. Giving effect to their contracts with the International Brotherhood of Electrical Workers;

g. Recognizing the International Brotherhood of Electrical Workers as the exclusive representative of their employees;

h. In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purposes of collective bargaining or other mutual aid or protection."

Thereupon Consolidated Edison Company of New York, Inc. and its said Affiliated Companies moved in the United States Circuit Court of Appeals for the Second Circuit to vacate and set aside the said order, and the National Labor Relations Board moved to confirm its order. While the said motions were pending, but before the same were heard, this Petitioner moved for an order permitting it to intervene in the proceedings so pending in the United States Circuit Court of Appeals, and the said motion was granted by the said Court, and this Petitioner thereupon became a formal party to the said proceeding. Thereafter the said motions came on for hearing, and were duly heard, and upon such hearing this Petitioner appeared by its counsel, Louis B. Boudin, Esq., who argued on behalf of this Petitioner orally in support of the order of the National Labor Relations Board, and also filed a brief in support of the same. The said motions terminated in an order of the United States Circuit Court of Appeals for the Second Circuit, confirming the said order of the National Labor Relations Board. The decision of the United States Circuit Court of Appeals is reported in 95 Fed. (2d) at p. 390.

Thereafter, Consolidated Edison Company of New York, Inc. and its said Affiliated Companies applied to the United States Supreme Court for a *writ of certiorari* to review the said decision of the Circuit Court of Appeals. Upon the said application notice was duly given to your Petitioner's counsel, Louis B. Boudin, Esq., who filed a brief in this Court in opposition to the said application. The said application was granted by this Court, and thereupon the said appeal

was argued in and heard by this Court. Upon the said argument your Petitioner appeared by its counsel, Louis B. Boudin, Esq., who argued the cause orally on behalf of this Petitioner, and also filed a brief in this Court for and on behalf of this Petitioner in support of the order of the Circuit Court of Appeals so appealed from. Thereupon this Court made its decision, modifying the decision of the Circuit Court of Appeals in one particular, and as so modified affirmed the same. The modification consisted in eliminating from the order of the National Labor Relations Board as quoted above the paragraph thereof marked "f", leaving all of the rest of the said order in full force and effect. The decision of this Court so made is reported in 305 U. S. at p. 197. Thereafter and thereupon the United States Circuit Court of Appeals for the Second Circuit, upon receiving the mandate of this Court, modified its decree in accordance with the directions of this Court. The last mentioned decree of the Circuit Court of Appeals was made and entered on or about the 21st day of March, 1939.

Thereafter, Consolidated Edison Company of New York, Inc. and its said Affiliated Companies committed certain acts and continued and still continue and are engaged in certain practices which your Petitioner believed, and still believes, were and are in violation of the decision of this Court and of the decree of the Circuit Court of Appeals entered in pursuance to the decision and mandate of this Court; and Petitioner, feeling aggrieved thereby, filed a petition in the United States Circuit Court of Appeals for the Second Circuit praying that Consolidated Edison Company of New York, Inc. and its said Affiliated Companies be adjudged in contempt of court for such violations. A summary of the facts upon which the said charge of violation was based is contained in the said petition; and the said allegations and charges were supported by voluminous affidavits which were filed in the said Court at the same time.

Notice of the said application was given to Consolidated Edison Company of New York, Inc. and its said Affiliated Companies, and the said companies thereupon filed an answer

to the said petition, and also certain affidavits in support of the allegations of their said answer, which said affidavits related to the commission or non-commission of the acts charged in Petitioner's affidavits.

The said answer commenced with the following statement, to wit:

> "Answering the motion and petition of Amalgamated Utility Workers affiliated with the Utility Workers Organizing Committee, C I O, dated May 10, 1939, *but reserving all objections to the assumed right of the Amalgamated Utility Workers to maintain this contempt proceeding* and to the assumption of jurisdiction by this Court over the proceeding instituted and prosecuted by the Amalgamated Utility Workers, the Consolidated Edison Company of New York, Inc., and its affiliated Companies, Brooklyn Edison Company, Inc., New York and Queens Electric Light and Power Company, Westchester Lighting Company, The Yonkers Electric Light and Power Company, New York Steam Corporation, and Consolidated Telegraph and Electrical Subway Company (hereinafter referred to as 'the companies'), by their attorneys, Whitman, Ransom, Coulson and Goetz, respectfully allege and show, upon information and belief, as follows:"

At the hearing upon the said motion or application, counsel for Consolidated Edison Company of New York, Inc. and its Affiliated Companies, in accordance with the reservation contained in the opening paragraph of their answer, made a preliminary objection to the effect that Petitioner had no right to make such a motion under the provisions of the National Labor Relations Act, and therefore had no standing in court—claiming that the only body or agency that could make such a motion under the provisions of the National Labor Relations Act was the National Labor Relations Board. The Circuit Court of Appeals thereupon sustained the said objection and *refused to entertain or consider the said motion or application upon the merits, upon the sole ground that Amalgamated Utility Workers had no standing in court.*

B.

Question Presented.

The *sole* question presented is:

Is the National Labor Relations Board the sole agency which may, under the provisions of the National Labor Relations Act, move to punish as for a contempt of court a person violating an order made by the National Labor Relations Board, after the same had been confirmed by the Circuit Court of Appeals, and has a person or body aggrieved by such violation no right to pray the Circuit Court of Appeals for relief to punish the violator for a contempt of court?

C.

Reasons Relied on for the Allowance of the Writ.

The question presented is one of statutory construction and of the greatest importance in the administration of the National Labor Relations Act, and has never been passed upon by this Court, nor by any Circuit Court of Appeals, except the Circuit Court of Appeals for the Second Circuit in the order sought to be reviewed. It is self-evident that the question is of the utmost importance not only to the Petitioner herein, but to all the labor-unions of this country, and to the entire body of workers of this country, since, as Petitioner believes, the decision sought to be reviewed seriously curtails their rights under the National Labor Relations Act.

In addition, the question is of the greatest importance to the National Labor Relations Board itself, and to the public at large, since this decision places upon the National Labor Relations Board the duty of examining into every claimed violation of the decrees of the Circuit Court of Appeals affirming its orders; and of prosecuting every such violation found to exist; and upon the public the expense of maintaining and paying for a sufficiently large legal staff to enable the National Labor Relations Board to discharge such duty.

Aside from the question of expense to the public involved, it is manifest that the National Labor Relations Board,—which is, as is well known, far behind its calendar because of the many cases brought to it for decision,—will be utterly unable to cope with the additional work that would devolve upon it if the decision sought to be reviewed be adhered to.

Petitioner also firmly believes that the decision sought to be reviewed is utterly at variance with the express provisions of the National Labor Relations Act; is contrary to the entire spirit of that enactment; and if permitted to stand will go far to destroy the remedies granted thereby, and to encourage the evil which the enactment of the National Labor Relations Act was intended to remedy.

Your Petitioner verily believes that this application presents a case cognizable under the rules of this Honorable Court and one eminently proper for review by this Honorable Court.

WHEREFORE, your Petitioner respectfully prays that a *writ of certiorari* be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record upon which its said decision and order were made, and that said order of the Circuit Court of Appeals may be reversed or modified by this Honorable Court, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and proper.

And your Petitioner will ever pray, etc.

Dated, August 28, 1939.

LOUIS B. BOUDIN,
of Counsel for Petitioner.

IN THE

Supreme Court of the United States

In the Matter of the Application
of
AMALGAMATED UTILITY WORKERS, affiliated with UTILITY WORKERS ORGANIZING COMMITTEE, CONGRESS OF INDUSTRIAL ORGANIZATIONS,
To Punish
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and its Affiliated Companies, BROOKLYN EDISON COMPANY, INC., NEW YORK AND QUEENS ELECTRIC LIGHT AND POWER COMPANY, WESTCHESTER LIGHTING COMPANY, THE YONKERS ELECTRIC LIGHT AND POWER COMPANY, NEW YORK STEAM CORPORATION, and CONSOLIDATED TELEGRAPH AND ELECTRICAL SUBWAY COMPANY,
For Contempt.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and its Affiliated Companies, et al.,
Petitioners,
against
NATIONAL LABOR RELATIONS BOARD, et al.,
Respondents.

OCTOBER TERM, 1939

No.....

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions Below.

The Circuit Court of Appeals, in the decision sought to be reviewed, rendered no opinion, except the following memorandum:

> "Motion denied on ground that moving party has no standing to press a charge of civil contempt, if contempt has been committed. Under the National Labor Relations Act the Board is the proper party to apply to the court for an order of enforcement and to present to the court charges that the court's order has not been obeyed."

II.

Jurisdiction.

Petitioner seeks a review by *certiorari* pursuant to Judicial Code, Section 240(a), as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (U. S. C. Tit. 28, Sec. 347(a)), and Sec. 10(e) of the National Labor Relations Act of July 5, 1935, c. 372, Sec. 10, 49 Stat. 453 (U. S. C. Tit. 29, Sec. 160(e)). The date of the decision and order sought to be reviewed is June 2, 1939. It was entered by the United States Circuit Court of Appeals for the Second Circuit in pursuanee of its ruling refusing to consider upon the merits the petition presented to it by Petitioner, and the charges made therein to the effect that respondent companies have violated the order of the National Labor Relations Board, as affirmed by the Circuit Court of Appeals and this Court. The matter came before the United States Circuit Court of Appeals for the Second Circuit by written petition of the Petitioner herein and the answer of Consolidated Edison Company of New York, Inc. and its Affiliated Companies.

III.

Statement of the Case.

A full statement of the case has been given under heading A in the petition for *writ of certiorari,* and for brevity the statement is not repeated here.

IV.

Specifications of Error.

The Circuit Court of Appeals erred in holding that Petitioner, the labor-union which filed the original charges or complaint upon which the National Labor Relations Board acted, and which was officially made a party to the original proceeding by order of the Circuit Court of Appeals, and was a party in the original proceeding in the said court as well as in this Court, and which is specifically mentioned in and directly affected by the order of the National Labor Relations Board, affirmed by the Circuit Court of Appeals and by this Court, had no standing in court to move to adjudge and punish the violators of the said order, as for a contempt of court, where the violation directly affects its rights and the rights of its members under the said order.

V.

Argument.

As stated in the preceding petition, the present Petitioner initiated the proceeding which resulted in the order of the National Labor Relations Board affirmed by the Circuit Court of Appeals and this Court. Formally, the said proceeding was commenced by the National Labor Relations Board filing its own complaint. But that complaint was the result of a charge or complaint filed by the present Petitioner with the Board. This Petitioner was, therefore, the real complainant in the case, even though formally the complaint was that of the National Labor Relations Board.

After the National Labor Relations Board made its order, the present Petitioner became a formal party to the proceeding by an order of the Circuit Court of Appeals permitting it to intervene, and it continued such a formal party in this Court,—its own counsel, appearing formally for it and on its behalf, arguing orally and submitting briefs in both the Circuit Court of Appeals and in this Court.

But not only did the present Petitioner initiate the proceeding, and participate as a formal party throughout the entire court litigation which resulted in the decree of the court claimed to have been violated, but that decree expressly recognizes the special rights of Petitioner in its very first provision. As stated in the preceding petition, the order of the National Labor Relations Board, affirmed by the Circuit Court of Appeals and by this Court, consists of two parts,—one containing prohibitions and the other containing directions. The first portion which contains the prohibitions orders Consolidated Edison Company of New York, Inc. and its Affiliated Companies to,—

> *"Cease and desist from: discouraging membership in United Electrical and Radio Workers of America,"*—

that being the name under which the present Petitioner was known at the time of the filing of the original charges and throughout the proceeding which resulted in the order in question.

Petitioner was thus not only a party litigant, but a party which recovered a judgment or decree protecting its own rights, in addition to its being the protector of the rights of its members. The petition to punish for contempt shows that its own rights as an organization as well as those of its members have been invaded by the violations complained of, and the petition was filed for the protection of its own rights as well as those of its members.

Petitioner's right to press for the punishment of the violators of the order and decree involved herein would seem to be unquestioned on general principles of law, but for the narrow, and, as we believe, utterly unwarranted construction given to the National Labor Relations Act by the court be-

low. This brings us to a consideration of the view of the law taken by the court below, which resulted in the order sought to be reviewed. Unfortunately, the court below did not write any opinion, and the reasoning which led to its conclusions has not been authoritatively stated. We must, therefore, resort to the arguments made by counsel on the other side in their argument on the objection which the court sustained for a statement of that reasoning. That argument was, in substance, that the National Labor Relations Act does not create any *private rights*, and that, therefore, the National Labor Relations Board,—the *public body* created by that Act,—is the only body which can invoke the aid of the courts against its violators. Enlarging upon that position, counsel for the other side argued that the National Labor Relations Act is similar to the Federal Trade Commission Act, and that the practice thereunder must, therefore, be assimilated to the practice under the Federal Trade Commission Act. And that since it had been held that a private party cannot move for the punishment of the violation of an order of the Federal Trade Commission, the same rule applies to violations of the orders of the National Labor Relations Board. This contention we believe to be utterly untenable, as flying in the face of the express provisions of the National Labor Relations Act. It seems to us clear that if the practice under the National Labor Relations Act is to be assimilated to the existing practice under any earlier Act, it should be assimilated to the practice under the Interstate Commerce Act, rather than to that under the Federal Trade Commission Act. Or, rather,—since this is not a question of *practice* but of *substantive law*,—if the character of the Act is to be judged by analogy to some other Act of Congress, it will be found that it is of the same character as the Interstate Commerce Act and not at all like the Federal Trade Commission Act.

The character of an Act of Congress is determined by the evil which it was designed to remedy, and, of course, its express provisions. And in interpreting a particular provision, in a doubtful case, the entire character of the Act, as gleaned from *all* of its provisions, as well as the nature

of the evil which it was intended to remedy, must be taken into consideration. And, we respectfully submit, that an examination of the Labor Relations Act under both aspects leads to the conclusion that the Act was designed *to confer rights upon individuals and associations, which they must be in a position themselves to assert;* and that the protection of those rights was not meant to be left entirely to the National Labor Relations Board. When the National Labor Relations Board has acted, and a violation of the rights thereby secured, and the remedy therefor prescribed, those whose rights have been found to have been violated and for whose benefit the remedies have been prescribed, have rights which they may assert in court *in propria persona,* and without the intervention of the National Labor Relations Board.

That the National Labor Relations Act is utterly *unlike* the Federal Trade Commission Act is self-evident: The latter Act deals entirely with frauds upon the public at large; while our Act deals with industrial practices designed to injuriously affect, and which do affect injuriously, special groups and individuals. An unfair labor practice does not consist in doing something to employees generally, but in acts affecting injuriously particular employees because they have attempted to organize themselves into labor organizations. Or, in another class of cases, the unfair labor practice consists in injury to particular labor organizations by discouraging membership in these organizations. It is true, that such acts are declared to be injurious to the public at large because of the manner in which they affect commerce. But that is also true of the unfair practices dealt with in the Interstate Commerce Act, and it is this which makes the National Labor Relations Act *like* the Interstate Commerce Act. Both of these Acts were designed to prevent certain industrial practices, which Congress had found to exist, which put it in the power of those controlling the industrial processes in question, to favor certain groups or individuals as against others, *to the injury of the latter,* but also to the injury of the public because of their effect upon commerce. That it is the injury to these individuals and groups with

which the legislation is primarily concerned is evident upon a bare inspection of the Act here under consideration. In fact, upon careful consideration, it will be found that the National Labor Relations Act emphasizes more strongly the *private* aspect of the evil with which it deals than does the Interstate Commerce Act. And this must be borne in mind when construing the remedial provisions of our Act.

In this connection it must be remembered that the right of Congress to legislate at all on this subject is due, not, as in the case of the Interstate Commerce Act, to a constitutional grant of power to legislate directly on the subject; but rather because of the effects upon commerce of the actions of the groups and individuals who are injuriously affected by the industrial practices sought to be prevented. Concededly, Congress has no power to legislate on the relation of master and servant, purely and exclusively as such, when the same relates to production only. If the matter were to be considered from that angle exclusively, Congress had no right to legislate on the labor relations of any of the employers involved in the cases decided by this Court under the National Labor Relations Act commencing with the *Jones and Laughlin* Case. The right of Congress to legislate on the subject is due entirely to the fact that the private grievances of certain individuals and groups in a matter in itself not subject to federal regulation has been found to habitually lead to certain *actions* on the part of those individuals and groups,—namely, *strikes*,—which made their *private grievances* a matter of public and federal concern within the meaning of the Constitution. In this respect the National Labor Relations Act differs from the Interstate Commerce Act, which deals with a subject matter directly within the power of the Federal Government. The *private* aspect of the problem is, therefore, much more pronounced in the National Labor Relations Act than in the Interstate Commerce Act. In construing our Act, that aspect of the situation must be particularly borne in mind,—and wherever there is any doubt at all, the Act must be construed with a view to the private grievances which Congress has found must result in certain acts on the part of those aggrieved,

providing *ample opportunity for the protection of the rights secured by the Act upon the motion of the parties aggrieved,* if the Act is to achieve the purpose and have the beneficial effects which Congress had in mind.

And this is not an invitation to the Court to speculate upon the purposes or intentions of Congress. Those purposes and intentions are clearly and expressly stated in the Act itself. The very first words of the Act show that the Act deals with private rights, and the entire statement of policy contained in Section 1 of the Act is an elaboration of the purpose of the Act to protect those private rights, because of the injurious effect which a denial of those rights has upon commerce, due to the action of the individuals and groups involved which would of necessity follow upon a denial of their rights. The opening statement of the policy of the Act is as follows:

> "The denial by employers of *the right of employees* to organize and the refusal by employers to accept the procedure of collective bargaining *lead to strikes and other forms of industrial strife or unrest,* which have the intent or the necessary effect of burdening or obstructing commerce."

And after elaborating on the thesis thus stated, the Act proceeds to say—

> "Experience has proved that protection by law of *the right of employees* to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce."

And after elaborating the second thesis, the Act concludes the statement of policy as follows:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by *protecting the exercise by workers of full freedom of association, self-*

> *organization, and designation of representatives of their own choosing,* for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

We turn from the statement of purpose and policy of the Act to its specific provisions. An examination of those provisions, we respectfully submit, clearly indicates an intention to confer *private rights* upon individuals as well as groups or associations which have an existence independent of any specific procedure provided by the Act, or agency created thereby. We do not mean to say by this that we suggest that the procedure followed by Petitioner is not actually provided by the Act. On the contrary, we contend that this procedure is actually provided by the Act,—even though we admit that it is not stated so clearly that no argument to the contrary could possibly be made. Although we must confess our amazement at the result arrived at by the court below after considering every argument that could possibly be advanced on the other side,—due regard being had to *all* of the provisions of the Act. That the Act confers a general right *upon individuals,* and that that right is *independent* of any other provision of the Act, is clear from Section 7 of the Act, the provisions of which are independent of any other provisions of the Act. Section 7 is as follows:

> *"Employees shall have the right* to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

In the face of these specific provisions of the statute,—stated as they are in a separate section of the Act,—we believe it is not even arguable that private rights are not created by the Act. The possibility of an argument on the other side,—the existence of which we conceded above,—refers only to the possibility of an argument as to whether the Petitioner has standing in court to assert these private

rights in the particular manner, but not as to their existence. The argument may be of two kinds: first, that the rights conferred are those of individuals only; and, second, that these rights can only be exercised in some special mode provided by the Act itself. But upon examination it will be found that this argument is utterly untenable on both of its branches. And for the following reasons:

(a) The Act clearly recognizes the rights of groups, particularly the rights of labor organizations.

An examination of the Act will show that throughout it speaks not only of the rights of individuals, but also of the rights of groups, and *specifically confers certain rights upon labor organizations.* So, for instance, in Subsection (a) of Section 9 of the Act it is provided that, notwithstanding the legality of a so-called closed-shop agreement if entered into under the conditions in that subsection stated, and an agreement having been entered into between an employer and a certain labor organization for a closed shop thereunder, "any individual employee or a *group of employees shall have the right* at any time to present grievances to their employer." But aside from the general recognition of the rights of groups *as* groups, there is specific recognition of labor-unions, and certain rights conferred upon them, under the designation "labor organizations." So, for instance, by Section 8 of the Act it is made an unfair labor practice—

> "To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

Or,—

> "By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage *or discourage membership in any labor organization.*"

Clearly, both the wrongs sought to be remedied as well as the rights conferred by this Act are primarily *private,*

even though the public has enough of an interest therein, because of the consequences to commerce flowing from a violation of the same to justify Congress in legislating on the subject and setting up an administrative agency for their protection. This brings us to the second contention, namely, that the general rights granted by the statute are limited by the setting up of the public agency which is to administer the Act.

(b) The powers conferred upon the National Labor Relations Board are not in derogation of the rights conferred by the National Labor Relations Act upon individuals, groups and organizations. Nor are its powers exclusive, except to determine, in the first instance, whether an unfair labor practice had been committed, and to prescribe the remedy therefor.

Before examining the specific provisions bearing upon this point, if any there be in the Act, we must again consider the purpose and object of the Act and its character as a whole. As already stated, the contention is that this Act is like the Federal Trade Commission Act, and that the practice thereunder should be assimilated to the practice under that Act, as prescribed by the decisions of the courts. But a mere glance at the two acts will demonstrate that the two acts are utterly unlike not only in their respective purposes, objects and characters as a whole, but in the character of their specific provisions. The evil designed to be remedied by the Federal Trade Commission Act being wholly and exclusively a public evil,—in the sense of frauds or impositions upon the public at large,—the whole Act of necessity partakes of the character of penal legislation. Its chief characteristic, therefore, is *that it does not create any private rights but declares public wrongs.* We have already seen that the principal section of the National Labor Relations Act,—the section which lays down the basic principle around which the whole Act revolves,—is a declaration of rights, *private rights.* Needless to say, the Federal Trade Commission Act declares no rights. The basic provision of the Federal Trade Commission Act is contained in the heading to and the opening sentence of Section 5 of

that Act (now Section 45 of Title 15, U. S. Code), which are as follows:

> "UNFAIR METHODS OF COMPETITION UNLAWFUL; PREVENTION BY COMMISSION: *Unfair methods of competition in commerce are declared unlawful.*"

"Unlawful" is the keynote of the Federal Trade Commission Act, and all its provisions are in harmony. It being a statute defining *wrongs*, a public agency is set up to protect the *public* against those wrongs and to prosecute the wrongdoers. Of necessity, that agency is the only body that can move under the statute,—just as public prosecutors are the only ones that can move in the prosecution of criminal offenses.

In this connection it is significant that even the acts prohibited by the National Labor Relations Act are not declared to be "unlawful". It is true that certain acts or practices are by the Act declared to be violations of its provisions, but nowhere does it say that those acts or practices are "unlawful", in the sense of being public *wrongs*. Section 8 of the National Labor Relations Act, which is the only one containing prohibitions, and which immediately follows the one in which private rights have been expressly declared, merely says,—

> "It shall be an unfair labor practice for an employer"—

to do certain things. But an unfair labor practice is not "unlawful" in the sense in which that word is used in statutes defining public wrongs. A violation of the provisions of Section 8 of the National Labor Relations Act does not expose the employer to any criminal prosecution, or to any penalty whatever. But it does give rise to the granting of certain relief to the injured parties. In this respect the Act is exactly like the Interstate Commerce Act: which, like the Act here under consideration, is designed to prevent unfair industrial practices injurious to particular individuals in the prevention of which the public has an interest.

It was only natural, therefore, that the functions of the public agency set up by the National Labor Relations Act for its administration, should be like those of the Interstate Commerce Commission, and *unlike* those of the Federal Trade Commission. And a comparison of the provisions of the National Labor Relations Act defining the functions of the National Labor Relations Board will show that these functions are, basically, utterly unlike the functions of the Federal Trade Commission. If we turn to Section 5 of the Federal Trade Commission Act we shall find that, having in its first sentence declared certain practices to be *unlawful*, it proceeds in its next sentence to impose upon the Federal Trade Commission *the duty* of preventing such practices. That sentence reads as follows:

> "The Commission is empowered *and directed* to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce." (Italics ours.)

But no such *duty* is imposed upon the National Labor Relations Board by the National Labor Relations Act. The National Labor Relations Board is not *directed* to do anything. It is not a public prosecutor in any sense of the word. It therefore has no *duties* of any kind to perform under the Act. It is an *industrial court of first instance*, pure and simple. It is therefore endowed with certain *powers*,—powers to investigate complaints, and powers of *decision* after *hearing* upon notice. Being an *industrial* court, it can move of its own accord, but there is no duty imposed upon it to move. And as a matter of *practice*, established by the Board since its organization and approved by the courts, it moves only upon the complaint of private parties. That such practice is fully in accord with the Act, will be shown by an examination of other provisions of the Act which clearly show that Congress had intended to set up a court of first instance, wherein *cases are heard and determined*, rather than a prosecuting agency charged with the duty to *act* of its own accord in order to accomplish the

design of the Act. The first and most important,—the *basic*,—provision in this connection is that which confers the power to act at all. That is contained in the opening sentence of Subsection (a) of Section 10 of the Act, which says,—

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce."

This language is exactly the same as that which confers power upon United States courts of first instance to hear and determine cases, and is clearly intended to confer jurisdiction to act as a court. It certainly does not impose any duties upon the Board, any more than the grant of *power* to a district court to hear certain cases imposes upon it the duty to move of its own motion or to do anything after it has rendered a decision. Two things must be further noticed in this connection: One is the sentence which immediately follows the one just quoted and which is the only one which gives the Board *exclusive* power. It is our contention, which we believe is borne out by the context in which this "exclusive" provision is contained as well as by the other provisions of the Act, that this exclusiveness refers to the *jurisdiction* of the Board to *hear and determine* whether or not an unfair labor practice had been committed, and prescribe the remedy,—both in the first instance, of course. The other thing to be noticed is that wherever any power is granted by the Act to the Board, other than the power to hear and determine cases of unfair labor practices, the Act uses the word "may" or the phrase "shall have power." There is only one duty imposed by the Act upon the Board, as far as we can discover,—that is to say, a duty *to do* something rather than to perform its functions *properly*,—and that is contained in Subsection (c) of Section 3 of the Act, which reads as follows:

> "The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail *the cases it has heard, the deci-*

> ***sions it has rendered,*** **the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed."**

The language of this section we believe to be not only significant but decisive on the point here under consideration. Not only is there no duty imposed upon the Board to do anything, it need not even report any action it has taken,—indeed, no action is apparently contemplated,—except its action *in performing its functions of a court.* And in the latter connection it is clearly contemplated that the Board would not be moving of its own accord but that it would be *hearing cases,* like any other court. In other words, the Act contemplates that the Board will be acting upon the complaint of private parties, who will come before the court thus created to assert and *vindicate* the rights guaranteed to them by the Act.

And this, we respectfully submit, applies not only to the initial stages but also after the Board shall have rendered its *decision,* as other provisions of the Act clearly indicate,—nay, *expressly provide.* There is no provision in the Act *expressly* providing for the filing of any complaint by the parties whose rights have been invaded,—the only provision for a "complaint" is the complaint of the Board itself; although filing of charges or complaints by individual parties before the Board is clearly contemplated. But the only place in which the right of a private party *to proceed* is expressly provided is in connection with proceedings *after* the Board shall have rendered its decision. Subsection (f) of Section 10 of the Act provides as follows:

> ***"Any person aggrieved*** **by a final order of the Board granting *or denying* in whole or *in part the relief sought* may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside."**

An analysis of this provision establishes two things beyond peradventure of a doubt: First, that the Board is not the only one that has a right to come to the Circuit Court of Appeals to complain of an unfair labor practice, *after* the matter shall have been heard by it in the first instance. The Act specifically says "*any* person aggrieved." And it specifically says that this does not mean any person aggrieved by the granting of relief, but includes *any person aggrieved by the denial of relief,* in whole or in part. In other words, a person filing a charge or complaint with the Board, which the Board has heard and passed upon, has a right in case of an adverse decision, denying the relief sought by him either in whole or in part, to file a petition in the Circuit Court for review, *and ask the Circuit Court to grant the relief which the Board had denied him.*

Second, that the Act contemplates throughout the presence of private parties seeking relief,—thereby establishing the fundamental rule that private parties have not only rights but *a standing in court* even where there is no specific provision therefor. There is no specific provision anywhere in the Act for a private person filing a charge or complaint before the Board, or giving *standing* to any such person before the Board, that is to say, *in the court of first instance under this Act.* Nevertheless, the provision just quoted speaks of *any person* who *sought relief* before the Board. That this provision gives the party who filed the charges standing to prosecute the charge before the Board has been recognized by the Board itself, which permits individuals or organizations filing charges to officially intervene and become parties of record. The position or *standing* of the party filing the charges, as *an independent party,* has also been recognized by the Circuit Court of Appeals as well as by this Court. For the Circuit Court of Appeals as well as this Court have recognized the right of the party making the charges to *intervene,* even though he was not aggrieved by the decision, but merely desires to *press the enforcement* of the decision. Indeed, in this very case, the present Petitioner was permitted to appear as an independent party

intervenor both in the Circuit Court of Appeals and in this Court to *press for the enforcement* of the very order of the Board the violation of which is involved in the proceeding which resulted in the order sought to be reviewed.

We, therefore, respectfully submit, that while neither this Court nor the Circuit Courts of Appeal have ever directly passed on the question sought to be reviewed on this petition, the decision sought to be reviewed is clearly *against the established practice of all the Circuit Courts of Appeal, including the Second Circuit, as well as of this Court.*

But the rights thus granted to the private party, specifically on the question of review and impliedly on the question of pressing the charge before the Board, cannot possibly terminate suddenly after a decision of the courts reviewing the action of the Board and affirming it. Not only is there no logical reason for it,—it would be contrary to the whole spirit of the Act. Furthermore, we respectfully submit, that it would be contrary to its express provisions on the subject of enforcement when taken as a whole. Again, we respectfully call the attention of the Court to the fact that there is no duty imposed by this Act upon the Board, except the judicial duty *to hear and determine* a proper case properly presented to it by a person seeking relief against a violation of the provisions of the Act. Particular attention is called to the fact that there is *no provision in the Act requiring the Board to move for the enforcement of its orders.* It is granted the power to do so, but that is all. It needn't do so if it does not want to. Of necessity, that means that the person who sought relief before the Board, and who had the right to seek a review of its decision denying him relief in whole or in part, has the right to move for the enforcement of the relief granted by the Board but which it does not seek to enforce.

The decision sought to be reviewed does not, therefore, merely narrow the rights granted to individual employees and labor organizations by the Act,—it mutilates the Act, and places upon it a construction contrary not only to its spirit but to every other express provision bearing on the subject contained in the Act.

We respectfully submit, a correct reading of the Act gives to both the Board and the person or organization aggrieved the right to apply to the court for an enforcement of the orders of the Board at any stage of the proceeding, "aggrieved" meaning now a violation of the order rather than a denial of relief.

That the party seeking relief has a right to do so seems to us beyond question. If there is any question at all, it can only arise as to the kind of relief which may be asked for by the Board and the party aggrieved, respectively.

While it seems to us unquestioned that the party who sought relief before the Board, and whose rights were intended to be protected by the order of the Board, has the right to move to punish the violator as for a civil contempt of court, there may be some question as to whether a private party could move to punish the violators as for a criminal contempt of court, which may frequently be necessary in order to insure observance of the order. There is a similar question as to whether or not the Board, not being a party aggrieved and having no rights of its own in the matter but merely performing a public function, can move to punish for a civil contempt. A correct reading of the Act, we respectfully submit, leads to the conclusion that the Board can move to punish for a criminal contempt; while the party aggrieved, the party whose rights have been invaded, can move for a civil contempt,—which is the rule governing all proceedings in equity, *and which does equity.*

This being a preliminary brief on an application for a *writ of certiorari*, and, therefore, under the rules of this Court intended merely to raise the legal questions rather than argue them at length, we refrain from arguing this question at length as well as from considering certain cases from which in the argument below counsel on the other side sought to deduce a rule by an *analogy* from the decisions of the courts under the Federal Trade Commission Act, and certain stray expressions *obiter* in the decisions of some of the lower courts under the National Labor Relations Act. Such discussion, we believe, under the rules of this Court,

has only a place in the more extended argument reserved for the time *if* and *when* the application for the *writ of certiorari* is granted.

We respectfully submit, that this case is clearly one in which it is proper for this Court to grant the writ which would permit such an extended argument, and authoritatively settle the important question of statutory construction involved.

Dated, New York, August 28, 1939.

Respectfully submitted,

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